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HAROLD B. WILLEY, C

IN THE
SUPREME COURT OF THE UNITED STATES

No. 414.

SONKEN-GALAMBA CORPORATION, a Corporation,
Petitioner,

vs.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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STATEMENT.

Respondent brought two actions in the United States District Court for the District of Kansas (Tr. 5-9, 12-15) to recover undercharges upon a total of 64 carload shipments of aluminum which had been melted down into the form of ingots, pigs or slabs from their prior shapes as parts of airplanes wrecked in World War II or which had become obsolete since that time and shipped to petitioner over respondent's railroad and connecting railroads. Petitioner paid the aluminum scrap rate upon such shipments and

respondent's suits were to recover the additional amounts due under the aluminum ingot rate.

The provision of the tariff which respondent contended applies to the shipments is as follows:

> "1570—Aluminum: Billets, blooms, ingots, pigs or slabs, see Notes 1 and 2, Items 1575 and 1576, loose (LCL, only if weighing 15 lbs. or over) or in packages.
>
> "1575—Note 1—Ratings apply only on material not further finished than hot rolled, rough hot extruded, rough hot pressed or rough hot hammered and not smooth, nor surface finished, commercially known as billets, blooms, ingots, pigs or slabs."
> (Tr. 55, 20, Ex. G, 407.)

The provision of the tariff which petitioner contended applies to the shipments is as follows:

> "Scrap, aluminum (See Note 1).
>
> "Note 1—includes only pieces (separate or combined) having value for remelting purposes only."
> (Tr. 56, 20, Ex. G, 407.)

The cases were tried to a jury which found by a special verdict that the shipments were covered by the "aluminum ingot, pig and slab" classification and judgment was thereafter rendered in favor of respondent. The Court of Appeals for the Tenth Circuit affirmed the judgment but held that the cases should not have been submitted to the jury and the trial court should have held as a matter of law that the tariff provision covering ingots, pigs or slabs applied to the shipments involved.

In answer to the present petitioner's contention that respondent was required to, and did not, prove that the aluminum material constituting the shipments was "commercially known" as ingots, pigs or slabs, the Court of

Appeals in its decision held that the language of the aluminum ingot tariff provision by its own language established and affirmed that ingots, pigs and slabs described therein were "commercially known as * * * ingots, pigs, or slabs," and no additional showing was required. The Court of Appeals further held that "even if the tariff provision in question be interpreted as requiring all goods within its purview to be 'commercially known as' ingot, pig or slab, the evidence of record is overwhelming that the goods in controversy were in common business terminology so regarded."

A considerable portion of petitioner's "Statement" is argumentative in nature and that portion will be discussed in our argument.

ARGUMENT.

Petitioner's Petition for a Writ of Certiorari should be promptly denied for the reason that none of the reasons set forth in Rule 19 for the granting of such writs is present here. The decision which petitioner seeks to have reviewed by this Court is one rendered by a Court of Appeals, and of the reasons enumerated in Rule 19 (b) for this Court granting such a writ the only one advanced and relied upon by petitioner is that the decision of the Court of Appeals for the Tenth Circuit is in conflict with decisions of other Courts of Appeals and with the decisions of this Court because the Court of Appeals in this case disregarded "commercial knowledge as a test of identification." We shall show that this contention is not correct for two reasons: (1) Under the tariff classification covering aluminum ingots, pigs or slabs quoted above in our statement of facts, Note 1 thereof itself provides that the material described therein *is* "commercially known as ingots, pigs

or slabs," making evidence and proof of such knowledge unnecessary and improper, and (2) Even if proof of commercial knowledge were necessary, it was supplied and proved by petitioner's own evidence.

The Tariff Classification Covering Aluminum Ingots, Pigs or Slabs Provides and Establishes That the Aluminum Shipments Involved Herein Were Commercially Known As Ingots, Pigs or Slabs.

Petitioner contended in the Court of Appeals and contends now that application of the ingot tariff requires evidence upon the question as to whether the aluminum constituting the shipments involved here was known commercially as ingots, pigs or slabs, and cites several cases in this Court and in other federal courts (involving, however, statutory import duties) where that was held necessary. The Court of Appeals held in the present case that this was not necessary or required because the tariff classification (1570, 1575, Note 1) itself asserted that the ingots, pigs and slabs described in the classification itself were "commercially known" as such; the Court stating that the clause "commercially known as billets, blooms, ingots, pigs or slabs," as it appears in the tariff provision involved here, was itself "an affirmation that ingots, pigs, or slabs of the size and processed in the manner detailed in the schedule are commercially known as ingots, pigs, or slabs," and that the clause was not one of limitation. Thus, the wording of the ingot classification itself does not leave open the question of commercial knowledge or use.

The Court of Appeals in this case had before it a tariff classification the wording of which was different than those involved in any of the cases cited by petitioner and those cases are of no effect whatever here. The statutory import duty provisions in those cases did not contain such a

clause as "commercially known as billets, blooms, ingots, pigs or slabs," or simliar one, *describing* the commodity named in the classification, as here. The decision of the Court of Appeals in this case simply interpreted the tariff provision before it, and none of the cases cited by petitioner nor any other federal court cases are in conflict with the present decision.

We think, as the Court of Appeals did, that the meaning of the ingot tariff involved here is clear and unambiguous. We contend that under the simple and ordinary rules of grammar the clause, "commercially known as billets, blooms, ingots, pigs or slabs" does not in itself constitute a qualification, restriction or limitation but merely is descriptive of what precedes it in the sentence—a parenthetical non-restrictive clause.

The qualification or limitation as to the material covered by the general classification in item 1570 is the part of the sentence in Note 1 reading: "not further finished than hot rolled, rough hot extruded, rough hot pressed or rough hot hammered and not smooth, nor surface finished." The clause "commercially known as billets, blooms, ingots, pigs or slabs" merely sets forth that the material designated and limited by the preceding clause is "commercially known" as such. This is easily demonstrated. If the clause "commercially known as billets, blooms, ingots, pigs or slabs" were intended to be a qualification, restriction or limitation, then it would not have been necessary to put in the intervening clause but simply to make Note 1 read as follows: "Ratings apply only on material commercially known as billets, blooms, ingots, pigs or slabs." If that had been done then, perhaps, the test to be applied as to each shipment would be whether the material was so commercially known. However, the note provides its own test—the rating shall apply only to material "not

further finished than hot rolled, rough hot extruded, rough hot pressed or rough hot hammered and not smooth, nor surface finished." The very purpose of the last clause in the sentence in the note is to establish, or at least recognize, that the kind of material described in the clause preceding it is commercially known as billets, blooms, ingots, pigs or slabs. There is a practical reason for this: the provision by a note of a simple physical description defining for the benefit of all parties affected what are aluminum billets, blooms, ingots, pigs or slabs under the ingot tariff provision and to establish definitely that other material further finished than as described could not be shipped under the ingot rate. Note 1 spells out the physical description for the benefit of all parties. If petitioner's interpretation were correct, how would a railroad know whether or not aluminum material offered for shipment in the form of ingots, pigs or slabs was ingots, pigs or slabs if it were required to get evidence or opinions in each instance from the aluminum industry or someone else as to whether the shipment offered was "commercially known as" an ingot, pig or slab?

The theory of petitioner in these cases and the testimony of its witnesses was that in order for an ingot, pig or slab to be commercially known as such it must have certain definite chemical specifications. How would it be possible or practical from a transportation standpoint to provide such a test? Obviously, there was no intention that the railroad be required to make chemical analyses of shipments and all it is required to do is see if the commodity is aluminum in the form of an ingot, pig or slab as described in Note 1. The chemical content of every shipment could not be tested, and the tariff did not intend that it be. The purpose of the note was to establish or recognize what were commercially known as billets, blooms, ingots, pigs or slabs, not to require further tests.

The Interstate Commerce Commission has passed upon this tariff provision in four cases (which will be later discussed) where shipments of commodities identical to the ones involved in these cases were involved, and the Commission held in each case that the commodity was an ingot and should be classified and rated as such under the same tariff provision involved here covering billets, blooms, ingots, pigs or slabs. In not one of those cases did the Commission even suggest (and apparently the aluminum industry complainants did not suggest or contend) that there must be proof that the commodity identical to that involved here was commercially known as an ingot, and this is a good indication that the aluminum industry itself does not agree with petitioner's interpretation and contention. And petitioner has cited no authority, and we are confident it can find none, which holds that before aluminum ingots, pigs or slabs shall be classified and rated as such under this tariff provision it must first be proved that they are commercially known as such. Certainly, the evidence in these cases, including that of petitioner, does show that the aluminum ingots, pigs and slabs which were the subject of these shipments were "material not further finished than hot rolled, rough hot extruded, rough hot pressed or rough hot hammered and not smooth, nor surface finished," and petitioner does not claim they were not.

We believe it clear that the last clause in Note 1 to the tariff provision covering ingots, pigs and slabs is merely an affirmation, as the Court of Appeals found, that the material described in the preceding portion of the sentence is such as is commercially known as ingots, pigs or slabs and does not constitute an additional qualification, restriction or limitation. Thus, there was no requirement that respondent show by evidence that the aluminum ingots, pigs and slabs involved herein were commercially known as

such, and petitioner's evidence in that regard was immaterial.

The construction of a railroad tariff presents a question of law (*Northern Ry. Co.* v. *Merchants' Elevator Co.*, 259 U. S. 285, 291; *Brown Lumber Co.* v. *L. & N. R. Co.*, 299 U. S. 393; *Boone* v. *United States*, 109 F. 2d 560, 562), and this is recognized by petitioner, for on page 15 of its brief it quotes from the case of *United States* v. *Missouri-Kansas-Texas R. Co.*, 194 F. 2d 777, 778, to that effect. The Court of Appeals interpreted the tariff involved here and that interpretation is not in conflict with any decision interpreting a similar or other tariff provision.

Even If Commercial Knowledge Were Required to Be Shown, Petitioner's Own Evidence Showed Conclusively That the Aluminum Involved Was Commercially Known As Ingots, Pigs, or Slabs.

The Court of Appeals held that even if the ingot tariff provision could be interpreted as requiring a showing that the aluminum described in it was "commercially known as" ingots, pigs or slabs, the evidence in the case is overwhelming that the aluminum in controversy was so regarded, and this was shown by petitioner's own evidence.

The very commercial transactions involving the commodities constituting the shipments in these cases showed that the subjects of those shipments were treated, designated, named and considered by all the parties, including petitioner, as ingots, pigs or slabs. We shall not take the space to point out the designations by the shippers, the petitioner, and others of all of the shipments but they were referred to and described during the testimony of Herman Galamba (Tr. 303-333) and are shown in petitioner's exhibits (Tr. 413-26). Some of the descriptions and designations, however, are as follows:

Shipment 1, Case No. 5016, bill of lading, "aluminum, scrap, secondary, ingots" (Tr. 303). Shipment 5, No. 5016, invoice, "aluminum scrap in slab form" (Tr. 304). Shipment 6, No. 5016, letter, "aluminum ingot" and "ingot" (Tr. 304-5). Shipment 8, letter, "aluminum ingot," letter, "rerun aluminum ingot," contract, "rerun aluminum ingot in slabs," invoice, "rerun aluminum slabs" (Tr. 305). Shipments 10 and 11, No. 5016, invoice and sales confirmation, "remelt duraluminum ingots," ocean bill of lading, "remelt aluminum ingots," memorandum from petitioner, "rerun aluminum ingot" (Tr. 305-6). Shipment 12, No. 5016, bill of lading, analysis certificate and letter of credit, "remelted aluminum ingots" (Tr. 307). Shipment 13, No. 5016, bill of lading and invoice, "rerun aluminum ingots" (Tr. 308). Shipments 14 and 15, No. 5016, affidavit of petitioner, "aluminum alloy ingots," letter, "aluminum alloy ingots" (Tr. 308-9). Shipment 16, No. 5016, contract, "Japanese remelted aluminum," chemical analysis, "ingots" (Tr. 309). Shipment 19, No. 5016, invoice, "ingots," contract, "remelted aluminum alloy ingots" (Tr. 311-12). Shipment 21, No. 5016, contract, "remelted aluminum ingots," invoice, "ingots," "half ingots" and "remelted aluminum ingots," letter from petitioner, "ingot" and "aluminum ingot," analysis, "ingots" (Tr. 312-13). Shipment 22, No. 5016, contract and invoice, "remelted aluminum alloy ingots," letter from petitioner, "ingots" and "square slabs" (Tr. 314). Shipment 26, No. 5016, contract, "rerun aluminum ingot" (Tr. 316). Shipment 30, No. 5016, invoice, "remelted aluminum ingots" and "ingots" (Tr. 317). Shipment 3, Case No. 5017, contract, "secondary aluminum," letter, "ingots, remelted aluminum," analysis, "slabs and ingots" (Tr. 318). Shipments 6, 7 and 8, No. 5017, contract, "remelted aluminum ingots," letter, "ingots" and "round top ingots" (Tr. 320). Shipment 12, No. 5017, invoice, "alumi-

num alloy ingots" (Tr. 322). Shipment 13, No. 5017, invoice, "ingots aluminum scrap," contract, "aluminum alloy ingots," letter, "remelted aluminum ingots" (Tr. 322). Shipment 14, No. 5017, letter, "aluminum ingots," letter from petitioner, "notched ingots" (Tr. 323). Shipment 15, No. 5017, contract, "rerun aluminum ingots," invoice, "aluminum ingots" (Tr. 324). Shipment 18, No. 5017, contract and invoice, "remelted aluminum alloy ingots," certificate and letter, "ingots" (Tr. 325-7). Shipment 27, No. 5017, contract and invoice, "rerun aluminum ingots," letter from petitioner, "slabs" (Tr. 329). Shipment 30, No. 5017, invoice, "rerun ingot," contract, "rerun aluminum ingots" (Tr. 331). Shipments 34, 35 and 36, No. 5017, bill of lading, "aluminum, pigs (ingots)" (Tr. 333).

Many of the various terms were used interchangeably in the same transaction.

These contracts, invoices, bills of lading, analyses and letters executed in connection with the transactions covering the purchase and shipment of the ingots, pigs and slabs constituting the shipments involved herein show clearly that in these commercial transactions between corporations representing a sizeable portion of the entire aluminum industry and representing the aluminum scrap industry (an entire industry in itself) the commodity was described in various ways as ingots, pigs or slabs and that these terms were understood by all as describing the commodity being sold and shipped. If there were a requirement it be shown by evidence that the ingots, pigs or slabs were commercially known as such (and the Court of Appeals held there was not), this evidence certainly showed that the ones involved in the shipments in these cases were known as such and were considered, referred to, recognized and treated as ingots, pigs or slabs by petitioner itself.

Petitioner also contends that since there is also a separate tariff classification for scrap aluminum the aluminum shipments involved here could fall within that tariff as well as the ingot tariff. It then argues that an ambiguity is thereby created and the scrap tariff, calling for the lower rate, must be applied. That rule is correct, of course, where there is an ambiguity, but there is no ambiguity here. The ingot tariff applies to aluminum ingots, pigs and slabs, in which form the aluminum here was shipped. After being melted into such form the aluminum was no longer scrap for transportation purposes. Petitioner concedes and contends that secondary aluminum ingots take the ingot rate, the same as do primary aluminum ingots, yet secondary ingots only have to have 50 per cent or more aluminum content (Tr. 237, 340). The evidence shows that the ingots made from scrap involved here were by contract usually required to and did contain over 90 per cent aluminum and always over 80 per cent aluminum (Tr. 304, 305, 306, 307, 309, 310, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 325, 328). There can, therefore, be no doubt that the commodity shipped was aluminum and that it was in the form of ingots, pigs or slabs. Whether the ingots, pigs or slabs had been scrap aluminum before it was made into ingots, pigs and slabs is immaterial. When it was cast into the form of aluminum ingots, pigs or slabs it became subject to the tariff covering that commodity. Certainly, there was no ambiguity.

The Interstate Commerce Commission has always held that the character of a shipment from a transportation standpoint and not the use to which it will be put governs its tariff classification.

In *Brown & Brown* v. *B. & M. R. R.*, 266 I. C. C. 310, it was said:

> "The Commission consistently has found that it is the character of an article from a transportation standpoint, and not the use to which it shall be put that determines the rate or rating applicable" (p. 312).

In *Paducah Hosiery Mills* v. *P. R. R.*, 171 I. C. C. 61, it was said:

> "Differences in rates must depend on some physical difference and not merely upon a difference in the use to which a commodity is put" (p. 62).

And the Interstate Commerce Commission specifically applied the transportation standpoint rule in the recent aluminum ingot decisions which we have hereinbefore referred to and which we shall later discuss herein. *Apex Smelting Co.* v. *New York Central R. Co.*, 288 I. C. C. 78; *Apex Smelting Co.* v. *New York Central R. Co.*, 292 I. C. C. 17; *American Smelting & Refining Co.* v. *Grand Trunk W. R. Co.*, 288 I. C. C. 383.

See, also, *National Petroleum Assn.* v. *A., T. & S. F. Ry.*, 37 I. C. C. 287; *Zimmerman-Wells-Brown Co.* v. *Director General*, 122 I. C. C. 199; *Royster Guano Co.* v. *A. C. C. R. R.*, 156 I. C. C. 522; *American Tank Co.* v. *K. C., M. & O. Ry.*, 167 I. C. C. 508.

As shown, the decision of the Court of Appeals is in no way in conflict with other decisions either of this Court or of other Courts of Appeals and there is no basis for certiorari being granted in this case.

The Identical Issue Involved in These Cases Has Been Determined Adversely to Petitioner by the Interstate Commerce Commission.

Not only, as we have pointed out, are there no decisions of this Court or of the Courts of Appeals which conflict with the decision in these cases, but there are four

recent decisions of the Interstate Commerce Commission involving *identical* essential facts which hold that the aluminum ingot tariff classification involved here and not the aluminum scrap tariff classification applies to shipments of scrap aluminum melted into the form of ingots, pigs and slabs, such as these. *Esperado Mining Co.* v. *Atchison, T. & S. F. Ry. Co.*, 278 I. C. C. 183; *Samuel Greenfield Co., Inc.*, v. *New York Central R. Co.*, 288 I. C. C. 59; *Apex Smelting Co.* v. *New York Central R. Co.*, 288 I. C. C. 78; 292 I. C. C. 17; *American Smelting & Refining Co.* v. *Grand Trunk W. R. Co.*, 288 I. C. C. 383. Because space will not permit we shall not quote from those decisions—since their similarity and applicability to our case is so complete and patent that extensive quotation would be required—but an examination of those decisions will show that they are completely decisive and determinative of the question of the classification to be applied in the present case; as they were found to be by the Court of Appeals in its opinion.

There are also other earlier decisions of the Interstate Commerce Commission which hold that the ingot or pig rate and not the scrap rate applied to the shipments at issue in those cases, which consisted of scrap metal melted into the form of ingots and pigs. *Federated Metals Corp.* v. *St. Louis-S. F. Ry. Co.*, 171 I. C. C. 78; *Marx & Sons* v. *Louisiana Ry. & N. Co.*, 151 I. C. C. 298; *Berman Bros. Iron & Metal Co.* v. *Alabama G. S. R. Co.*, 263 I. C. C. 678.

There is also a state court decision, *Yazoo & M. V. R. Co.* v. *A. Marx & Sons*, 17 La. App. 172, 135 So. 64, from which the Court of Appeals quoted in its opinion, which holds that scrap lead melted into the form of pigs should be classified as pig lead and not as scrap lead under the tariff in effect at that time.

Petitioner suggests that Interstate Commerce Commission decisions are not binding on the courts. While they

are not absolutely conclusive, all of the authorities are to the effect that such decisions are very highly persuasive because of the special training, knowledge and experience of the members of the Commission and like bodies with respect to the subject involved. 11 Am. Jur., Commerce, Sec. 153; 15 C. J. S., Commerce, Sec. 145; *Illinois Central R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 454; *Virginia R. Co.* v. *United States*, 272 U. S. 658, 665; *United States* v. *Pennsylvania R. Co.*, 21 F. 2d 579; *Empire Refining Co.* v. *Davis*, 6 F. 2d 305; *Updike Grain Corporation* v. *St. Louis & S. F. Ry. Co.*, 52 F. 2d 94; *Atchison, T. & S. F. R. Co.* v. *Union Wire Rope Corporation*, 1 F. Supp. 399; *Interstate Commerce Comm.* v. *A. W. Stickle & Co.*, 41 F. Supp. 268; *Koppers Gas & Coke Co.* v. *United States*, 11 F. Supp. 467.

In *Crancer* v. *Lowden*, 315 U. S. 631, this court held that it was proper to admit in evidence a prior decision of the Interstate Commerce Commission determining "virtually the same question" that was before the court.

In *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, this court held with respect to an order of the Commission in a proceeding involving other parties that the finding in that proceeding "was general in its operation and inured to the benefit of every person that had been obliged to pay" the rate involved; that "otherwise those who filed the complaint * * * would have secured an advantage over the general body of the public, with the result that the order of the Commission would have created a preference in favor of the parties to the record and would have destroyed the very uniformity which that body had been organized to secure" (p. 665). That ruling in that case was followed and applied in *Corray* v. *Baltimore & O. R. Co.*, 2 F. Supp. 829.

As pointed out, the Interstate Commerce Commission has consistently held that material identical to that involved in this present action comes within the ingot classification. Other shippers have paid on that basis and other railroads have collected on that basis. Those decisions should be followed, as they were by the Court of Appeals in this case, in the interest of uniformity, if for no other reason. If they are not, then a preference would be created in favor of petitioner here as against the shippers involved in those proceedings.

Directives and Orders of Other Governmental Boards Are Immaterial.

Petitioner contends that directives and orders of the Office of Price Stabilization and of the National Production Authority defining aluminum scrap and aluminum ingots are of some significance in this case. Although they are set out verbatim in Appendix B to petitioner's petition, they are not involved as an issue in the case within the meaning of Rule 40, 1 (c), as we understand that rule, but were merely part of petitioner's evidence on the question of commercial knowledge. Those orders and directives were not only not material because the question of commercial use and knowledge was not properly an issue in the case, but even if there were such an issue those orders and directives were also not material because they did not deal with the subject of transportation, such as is involved here. The Interstate Commerce Commission is the governmental body having the exclusive jurisdiction to determine the classification of commodities for transportation purposes and, as pointed out, its decisions hold that the material constituting the shipments involved here is ingots, pigs and slabs.

CONCLUSION.

It is clear that the decision of the Court of Appeals for the Tenth Circuit is not in conflict with any decisions of this Court or with the decisions of any other Court of Appeals. The decision, on the other hand, is in accordance with all of the decisions of the Interstate Commerce Commission in cases involving shipments identical in character to those involved here. Since a specific tariff classification, different in language from other tariff classifications and specifically covering only shipments of the character involved herein, is involved, it does not affect in any way other decisions of this or other federal courts which have passed upon and interpreted other tariff provisions or classifications. Therefore, there is no basis for petitioner's contention that the decision in this case leaves industrial shippers in a state of uncertainty, whether they be domestic shippers or importers of foreign goods. The Court of Appeals in this case has made no departure from the rules or holdings of any prior decisions of any court.

It is apparent, therefore, that no grounds for the granting of petitioner's Petition for a Writ of Certiorari have been shown or exist. The decision of the Court of Appeals was correct and the petition should be denied.

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